

STATE OF MICHIGAN  
COURT OF APPEALS

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RICHARD MACK,

Plaintiff-Appellant,

V

DAVID R. FARNEY and DAVID R. FARNEY,  
P.C.,

Defendant/Cross-Plaintiffs,

and

PLUNKETT & COONEY, P.C.,

Defendant/Cross-Defendant-  
Appellee.

UNPUBLISHED

April 1, 2003

No. 231602

Wayne Circuit Court

LC No. 96-617474-NO

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Before: Zahra, P.J., and Murray and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court order granting summary disposition to defendant Plunkett & Cooney pursuant to MCR 2.116(C)(10). We reverse in part and affirm in part and remand for further proceedings consistent with this opinion.

I. Facts and Procedure

Plaintiff filed suit against defendants alleging legal malpractice based on the loss of a personal injury claim against Michigan Consolidated Gas Company (“MichCon”) arising from a gasoline explosion in October, 1992.

Plaintiff was a City of Detroit employee working to repair a water main leak when the gas line exploded after being ruptured during excavation of the water main. The explosion caused injuries to several people, including plaintiff. Damon Peoples, who suffered injuries in the explosion, filed suit (the *Peoples* lawsuit) against the city and its employees, including plaintiff. The city retained defendant Plunkett & Cooney to defend it and its employees against claims arising from the explosion. Plunkett & Cooney attorney Laurel McGiffert filed an appearance to represent the City and its employees in the *Peoples* lawsuit. McGiffert does not

recall telling plaintiff that, although she was his attorney for the purpose of defending him, she was not his attorney for the purpose of bringing a claim for personal injuries. Plunkett & Cooney filed on behalf of plaintiff, the City of Detroit and others in the *Peoples* lawsuit a complaint against MichCon seeking contribution pursuant to MCL 600.2925(a). In October, 1994, MichCon negotiated a dismissal with prejudice of all cross claims and third party claims brought against it. The entry and substance of this October 1994 dismissal order in favor of MichCon is material to this lawsuit.

Plaintiff retained the services of attorney Gary Busch in October, 1992, to address plaintiff's worker's compensation claim. In February and April, 1994, Busch sent letters to McGiffert seeking information concerning the status of the *Peoples* lawsuit. McGiffert did not respond to Busch. On February 15, 1995, Busch sent plaintiff correspondence advising him that Busch had been ignored by McGiffert. Busch further advised plaintiff of the three-year limitations period for a negligence claim and informed plaintiff that he was taking no further action on plaintiff's behalf.

Thereafter, plaintiff tried unsuccessfully to contact McGiffert to inquire about his personal injury claim against MichCon. Plaintiff then contacted defendant attorney David Farney. Plaintiff told Farney that he had been sued by numerous people but that plaintiff had an attorney, presumably McGiffert, who was representing him and had filed his personal injury claim against MichCon. Plaintiff claimed that because he could not get any response from McGiffert, he hired Farney to investigate his claim against MichCon.

Farney testified that plaintiff retained him in February of 1995 to handle plaintiff's worker's compensation claim. The retainer agreement refers only to the worker's compensation claim. Farney indicated that while plaintiff claimed to have counsel to pursue his personal injury claim against MichCon, plaintiff did not have a clear picture of the status of that litigation. Farney offered to review the court file in the *Peoples* lawsuit and in May of 1995 advised plaintiff that he had concluded that the October 1994 dismissal order precluded plaintiff from bringing suit against MichCon. Thereafter, plaintiff claims he tried to contact McGiffert for clarification of the status of his claim against MichCon, but she did not respond to him.

The limitations period expired in October, 1995, without plaintiff pursuing a claim against MichCon. Plaintiff filed this malpractice action in 1996.

This is the second time this case has come before this Court. In the prior appeal,<sup>1</sup> this Court concluded that plaintiff's personal injury action against MichCon had not been lost as a result of the October 1994 dismissal order in the *Peoples* lawsuit. Specifically, this Court held that plaintiff's personal injury action against MichCon was a compulsory claim that plaintiff was required to bring with his contribution claim against MichCon. Therefore, had MichCon objected at the time to plaintiff's failure to join his personal injury claim with the contribution claim, as required by former rule MCR 2.203(A)(2),<sup>2</sup> res judicata would have barred a separate

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<sup>1</sup> *Mack v Farney*, unpublished opinion per curiam of the Court of Appeals, issued April 6, 1999 (Docket No. 201562).

<sup>2</sup> MCR 2.203(A) was amended effective June 1, 1999, to eliminate the provision concerning  
(continued...)

personal injury action by plaintiff against MichCon. However, because MichCon did not object, the res judicata effect of the dismissal did not bar the personal injury claim. Slip op, pp 6-7. This Court determined that Plunkett & Cooney was entitled to partial summary disposition with respect to a portion of the negligence alleged in ¶ 24(J) of the complaint: entering into an order that resulted in the loss of plaintiff's right to sue MichCon. This Court concluded plaintiff could not show that the alleged negligence of Plunkett & Cooney caused the loss of plaintiff's claim.<sup>3</sup> This Court also reversed the trial court's order granting defendant Farney summary disposition because Farney's advice that plaintiff could not sue MichCon under any circumstances was mistaken in light of MichCon's failure to object to the nonjoinder.

On remand to the trial court, Plunkett & Cooney filed another motion for summary disposition pursuant to MCR 2.116(C)(10) with respect to the remaining allegations of negligence. Plunkett & Cooney argued that plaintiff's retention of Farney before the expiration of the limitations period "disconnected" Plunkett & Cooney's alleged negligence from the loss of plaintiff's claim against MichCon.

Plaintiff responded that several of the alleged negligent actions by Plunkett & Cooney were a proximate cause of the loss of plaintiff's malpractice claim. These negligent actions allegedly included: Plunkett & Cooney's failure to maintain proper communication with plaintiff, which in turn led plaintiff to believe that Plunkett & Cooney was representing him and resulted in his ignorance of the effect of the dismissal order; Plunkett & Cooney's failure to obtain plaintiff's informed consent for the order, which led to plaintiff's ignorance of the order and his eventual belief that the order dismissed all of plaintiff's claims against MichCon; and the negligent drafting of the order itself which made it foreseeable that a reasonable attorney would believe the order precluded a personal injury claim against MichCon.<sup>4</sup>

The trial court granted Plunkett & Cooney's motion, explaining that Farney's erroneous advice, which came before the limitations period expired, was not Plunkett & Cooney's fault. The trial court further concluded that it was unlikely that any failure to communicate or advise was a cause of plaintiff losing his right to sue on his personal injury claim.

## II. Analysis

Plaintiff argues that the trial court erred in granting the summary disposition motion with respect to Plunkett & Cooney's: a) failure to obtain plaintiff's consent to entry of the dismissal order, b) failure to send and explain the order to the plaintiff, c) failure to maintain proper communication with plaintiff, and d) negligence in drafting the order. We agree that Plunkett &

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waiver of the joinder rules as a result of a party's failure to object.

<sup>3</sup> This Court did not address the remaining allegations of negligence against Plunkett & Cooney.

<sup>4</sup> These are the allegations on which plaintiff focuses on appeal. In response to Plunkett & Cooney's motion, plaintiff addressed other allegations concerning Plunkett & Cooney's alleged failure to limit the scope of its representation, representation of plaintiff and the city of Detroit while in conflict of interest, and failure to investigate, litigate or refer plaintiff's personal injury claim. On appeal, plaintiff does not challenge the court's ruling with respect to those allegations.

Cooney failed to establish that it was entitled to summary disposition with respect to the first three of these allegations, which we shall collectively refer to as a failure to obtain plaintiff's informed consent to the content and entry of the MichCon dismissal order. We reject, however, plaintiff's claim that he presented a material factual question regarding whether Plunkett & Cooney negligently drafted an order that would lead a reasonable attorney to conclude that plaintiff's personal injury claims were dismissed with prejudice. We decline to recognize any claim based on negligence in drafting an order. Even if the order was extremely broad in its language, this Court previously held as a matter of law that the order did not bar a personal injury action by plaintiff against MichCon. Therefore, the drafting of the order cannot as a matter of law be the proximate cause of the loss of plaintiff's claim against MichCon. As set forth in this opinion, however, viewing the evidence in a light most favorable to plaintiff, we conclude that McGiffert's failure to obtain plaintiff's informed consent to the content and entry of the MichCon dismissal order, including McGiffert's failure to explain its effects, can be a cause in fact for plaintiff's injury that ought to be presented to a jury.

The crux of Plunkett & Cooney's argument on appeal is that because plaintiff retained attorney Farney in May, 1995, to represent plaintiff in his personal injury action against MichCon, Plunkett & Cooney's alleged legal malpractice could not be the cause in fact of plaintiff's injury. Generally, causation is a question of fact to be decided by the factfinder. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 595 n 30; 513 NW2d 773 (1994); *Dep't of Transportation v Christensen*, 229 Mich App 417, 424; 581 NW2d 807 (1998). Cause in fact "requires showing that 'but for' the defendant's actions, the plaintiff's injury would not have occurred." *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994). When a number of factors contribute to producing an injury, a plaintiff may establish factual causation by showing that the defendant's actions, more likely than not, were a substantial factor in bringing about the injury. *Id.* at 165 n 8. Considerations relevant to whether a factor was substantial include: (1) the number of other factors that contributed to producing the harm and the extent of the effect that they had on its production; (2) whether the actor's conduct created a force or series of forces that were in continuous and active operation up to the time of harm or whether the actor created a situation harmless until affected by other forces for which the actor is not responsible; and (3) the lapse of time. *Poe v Detroit*, 179 Mich App 564, 576-577; 446 NW2d 523 (1989), citing 2 Restatement Torts, 2d, § 433, p 432.

Plunkett & Cooney argues that Farney, who was retained by plaintiff eight months before the statute of limitations expired on plaintiff's personal injury claim, is solely responsible for the loss of plaintiff's claim. This Court's prior opinion did indeed recognize that Farney was "mistaken" in his advice that plaintiff could not sue MichCon. Contrary to Plunkett & Cooney's assertions, however, this Court did not lay the responsibility for plaintiff's inability to sue MichCon solely on Farney. An injury may have more than one proximate cause. *Hagerman v Gencorp*, 457 Mich 720, 729; 579 NW2d 347 (1998). Plaintiff testified that he sought assistance from Farney only because he had not been able to communicate with McGiffert. Plaintiff claims McGiffert never explained the order to him and never obtained his consent to enter the order. Significantly, Plunkett & Cooney maintains it knew the order did not bar plaintiff's personal injury claim against MichCon. More significant, however, is plaintiff's assertion that this fact was never conveyed to him.

We recognize the instant case presents a very close question of law. We reverse the judgment entered by the learned trial judge because of the very unique facts that are this case. Unlike most attorney malpractice cases involving multiple counsel where it is clear from the record that the aggrieved client left one counsel and placed his trust and confidence in newly retained counsel, here Plunkett & Cooney represented plaintiff in the *Peoples* lawsuit at all times relevant to this lawsuit. If it is found that Plunkett & Cooney did not seek plaintiff's consent nor explain to him the effects of the order, then those actions may be submitted to a jury as a cause in fact of plaintiff failing to file a claim against MichCon for personal injury.

Plunkett & Cooney relies on *Boyle* for the proposition that an attorney is not liable for failing to timely file the plaintiff's claim where the attorney was replaced by another attorney before the statutory period of limitations ended. *Id.* at 744-745. This case is distinguishable from *Boyle* on two significant grounds: 1) whether Plunkett & Cooney ceased to represent plaintiff on his personal injury claims before the limitations period expired is at least a matter of factual dispute, and 2) plaintiff here is not relying on allegations that Plunkett & Cooney failed to timely file the claim.

The finding of nonliability in *Boyle* was premised on the termination of representation and replacement by alternative counsel before the limitations period ended. "Retention of an alternate attorney effectively terminates the attorney-client relationship." *Mitchell v Dougherty*, 249 Mich App 668, 683; 644 NW2d 391 (2002), citing *Maddox v Burlingame*, 205 Mich App 446, 450; 517 NW2d 816 (1994); *Stroud v Ward*, 169 Mich App 1, 4; 425 NW2d 490 (1988). However, *Maddox* suggests that consultation with other counsel does not necessarily terminate the original attorney-client relationship where the consultation is in addition to, rather than in place of, the original counsel. The evidence concerning plaintiff's hiring of Farney, including the written retainer agreement and their respective impressions of the relationship, could lead reasonable minds to differing conclusions.

Furthermore, although this Court in *Mitchell*, *supra*, 249 Mich App 685, held that an attorney-client relationship can be terminated by implication, it was based upon a showing that the intent of the plaintiffs was to in fact terminate their relationship with the defendant law firm. In *Mitchell* there was no evidence that plaintiffs "sought to continue representation by defendant law firm." *Id.* at 685. In this case, however, plaintiff claims he tried to contact Plunkett & Cooney several times after seeing Farney, to seek an explanation of the dismissal order. In effect this continued Plunkett & Cooney's representation.<sup>5</sup> At a minimum, this raises another instance where reasonable minds can differ in regard to the intentions of plaintiff both when he met with Farney, and when he attempted to contact Plunkett & Cooney after Farney's letter. Any termination of liability that arguably may have occurred by plaintiff's retention of Farney was revived by Plunkett & Cooney's failure to return plaintiff's calls as required by their continued representation of plaintiff in the *Peoples* lawsuit.

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<sup>5</sup> Further, as discussed later in this opinion, there is no question that Plunkett & Cooney did indeed continue to represent plaintiff in the *Peoples* lawsuit and plaintiff's remaining allegations of negligence relate to Plunkett & Cooney's professional services in that suit.

The present case is also distinguished from *Boyle* by the difference in the type of negligence alleged by plaintiff. In *Boyle, supra*, 168 Mich App 745, the Court held that the original attorney could not be held liable for failing to file a claim where he ceased to represent the plaintiff and was replaced by alternative counsel before the limitations period expired. In contrast, plaintiff is no longer relying on allegations that Plunkett & Cooney was negligent for failing to timely file his claim against MichCon. Instead, he is relying on his allegations that Plunkett & Cooney negligently failed to obtain his informed consent to the content and entry of the MichCon dismissal order. It is Plunkett & Cooney's failure to educate plaintiff as to the effects of the order that, in part, led plaintiff to conclude that he lost his right to pursue a personal injury action against MichCon.

The type of negligence alleged is also significant as it relates to the question of whether or not the attorney client relationship ceased upon the retention of other counsel. Again, we find compelling the fact that Plunkett & Cooney continued to represent plaintiff in the *Peoples* lawsuit after plaintiff retained Farney. It is the negligence alleged in the *Peoples* lawsuit, i.e. the failure to obtain defendant's informed consent to the content and entry of the MichCon dismissal order, that is arguably a cause of the damage sustained by plaintiff. Again, viewing the facts in a light most favorable to plaintiff, had McGiffert maintained appropriate client communication with plaintiff and informed plaintiff of the effects of the MichCon order, plaintiff arguably would not have lost his personal injury claim. This is especially true considering McGiffert's claim that she knew throughout her representation of plaintiff that the dismissal order did not bar his personal injury claim against MichCon.

Once again we recognize that this case presents a very close question of law. In coming to our decisions we place significant weight on the fact that this is an appeal of a summary disposition order pursuant to MCR 2.116(C)(10). As such, with the evidence considered in a light most favorable to plaintiff, Plunkett & Cooney ultimately failed to show that there were no material facts in dispute and that reasonable minds could not differ on the outcome.

### III. Conclusion

The trial court's order granting Plunkett & Cooney's motion for summary disposition is reversed with respect to plaintiff's allegations that Plunkett & Cooney failed to obtain plaintiff's informed consent to the content and entry of the MichCon dismissal order. The trial court order is affirmed as to plaintiff's remaining allegations that Plunkett & Cooney negligently drafted the MichCon dismissal order.

Reversed in part and affirmed in part and remanded for further proceedings consistent with this opinion.

/s/ Brian K. Zahra, P.J.  
/s/ Christopher M. Murray  
/s/ Karen M. Fort Hood